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SUPREME COURT U.S.

NO. 82 5542

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

DAVID J. BROWN,

Petitioner

v.

STATE OF NORTH CAROLINA,

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT
OF NORTH CAROLINA

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QUESTION'S PRESENTED

The defendant in this case is a black man, convicted of the savage murder of two white women and sentenced to death by an all-white North Carolina jury from which the state had pre-emptorily excluded two and the court had excluded two of the only four blacks called. (Transcript, p. 1806) In this context, these are the questions before the court:

1. When --

   a) the evidence of the defendant's guilt includes no confession or admission, no indication of motive, and no placement of the defendant at the scene of the crime;

   b) the state's case is based entirely on circumstantial evidence, much of which arose from the physical circumstances at the place of the crime;

   c) that place of the crime is the only practical source of facts that could defuse the state's circumstantial evidence and support the defense contention that the crime occurred while the defendant was hospitalized;

   d) the state prevented defense access to witnesses familiar with that place;

   e) The state at all times, from the arrest of the accused through his trial, denied any defense access to that place, such that the state's own supreme court has concluded that the accused was thereby denied "fundamental fairness and due process" and such that it prejudiced counsel's opportunity to prepare an adequate defense;

   --may the North Carolina Court nonetheless permit the accused to be executed, on the grounds that the admitted denial of even "rudimentary fairness" was "harmless" error beyond a reasonable doubt?

2. Can the state evade review of a search warrant and justify a search solely on the basis of a questionable consent given hours before the search started when the state issued the warrant after the alleged consent was given, when the officers conducting the search announced and relied upon the warrant before beginning the search and when the consenter was arrested long before the search was completed?

3. Is the North Carolina Supreme Court miscontruing this Court's decisions and thereby imposing an unconstitutional, mandatory death sentence by requiring a jury to return a verdict of death when it finds aggravating circumstances outweigh mitigating circumstances?

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The opinion of the Supreme Court of North Carolina is reported at _____ N.C. _____, 293 S.E. 2d 569 (1982), and is attached as Appendix A.

JURISDICTION

The opinion of the Supreme Court of North Carolina was filed on July 13, 1982. (Appendix A) The judgment of the Supreme Court was issued on August 3, 1982. (Appendix B) On September 9, 1982, Chief Justice Burger extended the time for filing this petition to and including October 11, 1982.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3), petitioner having asserted below and herein asserting deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. amend. IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the person or things to be seized.

U. S. CONST. amend. VI:

> In all criminal prosecutions the accused shall enjoy the right...to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. CONST. amend. XIV, §1:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law...

N.C. GEN. STAT. §15A-200(b):

> (b) Sentence Recommendation by the Jury. - Instructions determined by the trial judge to be warranted by the evidence shall be given by the court in its charge to the jury prior to its deliberation in determining sentence. In all cases in which the death penalty may be authorized, the judge shall include in his instructions to the jury that it must consider any aggravating circumstance or circumstances or mitigating circumstance or circumstances from the lists provided in subsections (e) and (f) which may be supported by the evidence, and shall furnish to the jury a written list of issues relating to such aggravating or mitigating circumstance or circumstances.
>
> After hearing the evidence, argument of counsel, and instructions of the court, the jury shall deliberate and render a sentence recommendation to the court, based upon the following matters:
>
> (1) Whether any sufficient aggravating circumstance or circumstances as enumerated in subsection (e) exist;

(2) Whether any sufficient mitigating circumstance or circumstances as enumerated in subsection (f), which outweigh the aggravating circumstance or circumstances found, exist; and

(3) Based on these considerations, whether the defendant should be sentenced to death or to imprisonment in the State's prison for life. *****

N.C. GEN. STAT. §15A-2000(c):

(c) Findings in Support of Sentence of Death. - When the jury recommends a sentence of death, the foreman of the jury shall sign a writing on behalf of the jury which writing shall show:

(1) The statutory aggravating circumstance or circumstances which the jury finds beyond a reasonable doubt; and

(2) That the statutory aggravating circumstance or circumstances found by the jury are sufficiently substantial to call for the imposition of the death penalty; and,

(3) That the mitigating circumstance or circumstances are insufficient to outweigh the aggravating circumstance or circumstances found.

STATEMENT OF THE CASE

PRIOR PROCEEDINGS

The petitioner, David J. Brown, a black, was arrested on August 28, 1980, and charged with the murder on or about August 25, 1980, of Shelly Diane Chalflinch and Christina S. Chalflinch, both white, in Pinehurst, Moore County, North Carolina. (R pp 1-3) A probable cause hearing, calendared for September 17, 1980, was continued by an ex parte order granted at the state's request. (R p 38) Petitioner was, however, indicted on the charges on September 29, 1980 (R pp 4-6), and no probable cause hearing was held. Pretrial motions in the case were heard in Moore County on October 27, 1980 (R pp 46-50), and on November 14, 1980. (R p 52) The case came on for trial on December 8, 1980, before the Honorable Julius A. Rousseau, Jr. The jury returned verdicts of guilty to two counts of first degree murder on December 18, 1980 (R p 140) and verdicts mandating the death penalty in both cases on December 20, 1980, following the sentencing phase. (R pp 233-235)

Petitioner appealed, pursuant to North Carolina's appeal of right in capital cases, to the North Carolina Supreme Court. He alleged that his rights under the United States and North Carolina Constitutions and under state statutory law occurred before trial and during both the guilt and sentencing phases of trial.

As to the guilt phase of the trial, the North Carolina Supreme Court, apparently basing its conclusion on the Due Process Clause of the United States Constitution, held that petitioner had been denied "fundamental fairness and due process" (Appendix A, p 12) because he had been denied access to the crime scene which "had been under the control of the Pinehurst Police Department from the time the victims' bodies were found until the time of the trial" (Appendix A, p 10) and because the "State relied heavily on for information gained from the crime scene for its case." (Appendix A, p 12) The Supreme Court found no other constitutional or statutory error, and, based primarily upon Chapman v. California, 386 U.S. 18 (1967), held that denial of access to the crime scene was harmless error beyond a reasonable doubt because "of other overwhelming evidence of petitioner's guilt." (Appendix A, p 13)

The Court majority found no error in the sentencing phase, and in explaining the jury instruction issue raised herein, referred to its decision in State v. Pinch, _____ N.C. _____, 292 S.E.2d 203 (1982). (Appendix A, pp 40, 41) One Justice dissented, and, referring to his dissenting opinion in State v. Pinch, voted to remand for a new sentencing hearing because of constitutional error. (Appendix A, p 44) (The relevant portions of the Pinch decision are attached as Appendix C; the Pinch dissent is attached as Appendix D.)

STATEMENT OF FACTS

At about 8:00 a.m. on the morning of August 26, 1980, the bodies of Diane Chalflinch and her nine-year old daughter, Christina, were found in the Chalflinch apartment, No. 9 in the Pinehurst Married Quarters. (R p 55) The apartment was cordoned off by the police and remained so throughout the trial. (R pp 58, 236) Extensive testing and investigation was performed on the interior of apartment (R pp 62, 64, 68, 77, 78), on items found in the apartment (R p 86) and on the bodies. (R pp 73-76) The apartment was very hot (R p 55) and the bodies had begun to decompose. (R p 73)

Petitioner worked as a chef for the Pinehurst Hotel (R p 89) and lived in Apartment No. 4 of the Married Quarters. (R pp 105, 106) On Sunday evening, August 24, 1980, he went with a friend to a party for 100 to 150 people where he consumed a substantial amount of alcohol and took pills known as "Black Beauties". (R pp 90, 91) When the party was over, around midnight, defendant

went with the host and others to a local nightspot, The Crash Landing. (R p 91) After leaving, petitioner was picked up by a local policeman who encountered him at about 2:00 a.m. as he was walking along the highway near the Crash Landing. (R pp 104,105) The policeman drove petitioner to the Pinehurst Hotel, because he said he wanted to be there by 5:15 a.m. for work (R p 104) and if he went to sleep then, he would not wake up. (R p 105) At the hotel, he was seen from about 2:30 a.m. until 3:00 a.m. on the 25th by the night shift supervisor, who characterized petitioner as drunk and trying both to make a telephone call and to get into the kitchen where he worked. (R pp 109, 110) At 7:00 a.m. on the 25th, a co-worker in the kitchen saw him and noticed his thumb was bandaged. (R p 93) Defendant said he had cut it while fixing a sandwich at home. (R pp 91, 109) After work, he went to the hospital for treatment (R p 115) and remained there until at least 4:10 on the morning of August 26, 1980. (R p 116) On both August 26 and August 27, Brown was interviewed by State Bureau of Investigation (SBI) agents (R p 175), and on August 28, after several hours of interrogation, he signed a form giving permission to search his apartment. (R p 72)

Around 8:00 p.m., August 28, several officers arrived at Brown's apartment, read a search warrant to him and proceeded to search. (R pp 178, 198, 199) About one to one and one-half hours after the search had begun, petitioner was arrested and taken away. (R p 199) The search continued until at least 3:00 a.m. with extensive testing and evidence gathering (R pp 83-85) in both the Brown and Chalflinch apartments. (R p 81)

Before trial, petitioner requested voluntary discovery from the state. (R p 26) When this was not provided, he filed motions pursuant to North Carolina's statutes and Constitution and pursuant to the United States Constitution to obtain, among other things, permission to inspect the crime scene (R p 30) and evidence tested from both the crime scene and defendant's apartment (R pp 28-30), to obtain the identity of persons seeing either victim after August 22 (R p 29), and to obtain the identity of any person who might be suspected of involvement in the crime (R p 27). The motions to view the crime scene and for exculpatory material were denied. (R pp 39, 40, 41)

During the pretrial hearings, petitioner was prevented from obtaining information about the crime scene (R pp 47, 48) and learned that state investigators had been instructed not to talk with defense attorneys. (R pp 51, 52)

The district attorney stated to the court:

> ...I told my assistants to inform the agents not to provide information to defense counsel, and I will continue to do that...in all criminal cases because the only purpose we submit in...having the officer explain fully how he treated each and everything down there that might be used as evidence against defendant is solely for the purpose of trying to find some flaw in it so he can cross-examine and discredit my officer at the trial state--and that's the reason for that instruction....--and certainly I instructed the officer that and will again.

(R p 52) (emphasis added).

During the trial, petitioner learned that requested exculpatory information, in the hands of the state for months, had not been disclosed (R pp 164, 171) and that the prosecutor had moved a witness to prevent the defense from talking with him. (R p 99) He was also prevented from obtaining exculpatory information by the court's having sustained state objections and refusing to allow answers for the record. (R pp 68-71)

The State's evidence during the guilt phase of the trial showed the following: Ms. Chalflinch and her daughter had been mutilated and killed by multiple, deep stab wounds. (R pp 74, 76) Blood was throughout their apartment. (R p 58) More than 60 latent prints from the apartment were submitted for identification. (R p 80) Of the 41 which were sufficient for identification, only one was identified as petitioner's. [1] [Petitioner had been in the Chalflinch apartment before August 25, 1980 (R p 111) [2], and the latent print expert could not deny that the print may have been put there months before. (R p 80)] A silver ring was found inside Ms. Chalflinch's body (R p 74), and four witnesses identified it as one belonging to David Brown. (R pp 89, 93, 94) A broken knife blade found in the victims' apartment was the same make - R. H. Forschner - as those used by petitioner and by other kitchen workers at the hotel. (R p 110) Some of the evidence obtained from the search and examination of petitioner's apartment and introduced at trial included the box of knives petitioner used in his work (R pp 60, 61) and the presence of minute traces of blood revealed by the use of extremely sensitive chemicals. (R p 84) Very small visible blood spots were found on the outside

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1. The North Carolina Supreme Court stated that a bloody palm print found in the apartment, was identified as Mr. Brown's (Appendix A, p 14); however, the record reveals only that the presence of blood, found through the use of very sensitive chemicals, was "in a small space - immediately on the right side of the area which bears ridges as part of the palm print" identified as petitioner's. (R p 85)

2. The record indicates that a witness testified petitioner had been in the apartment before "October 25, 1980," (R p 111) but the reference to October, certainly is inadvertent and referred to September.

door frame, on the bedroom door frame, on a pair of pants (R p 86), and on a pillow case. (R p 84) Petitioner's blood type was not found in the victims' apartment and neither of the victims' types were identified in his apartment. (R p 86) The quantity of blood found in petitioner's apartment was so small that tests could not be done to determine whether it was his blood type or even whether or not it had come from a human or some other animal. (R p 86)

During the sentencing phase, the state offered only one witness, Roy Brown. Brown had been in the "drunk tank" awaiting trial on several misdemeanor and felony charges when Petitioner was jailed in a nearby cell. (R p 141) He claimed that petitioner talked about the murders soon after arriving, saying either that he had murdered them with a knife or that he was told they were killed with a knife. (R pp 141, 142) This testimony was not used or alluded to during the guilt phase of petitioner's trial.

HOW THE FEDERAL QUESTIONS WERE RAISED

I. Petitioner requested before trial, at trial, and after trial that he be allowed to inspect the crime scene (R pp 26, 30, 195-198, 235), which was under the exclusive control of the state. (R pp 58, 236) The court denied his motion each time. (R pp 41, 198, 236) Petitioner argued on appeal that the denial was an unconstitutional deprivation of his right not only to due process but also to the effective assistance of counsel particularly in light of prosecutorial instructions that state agents not discuss with him their findings from the crime scene (Appellant's Brief, pp. 8-12) and in light of prosecutorial withholding of exculpatory information. (Appellant's Brief, pp 15-18) The North Carolina Supreme Court held that denial of access to the crime scene did deprive him of "rudimentary fairness" and due process (Appendix A, pp 12,13) but that the error was harmless beyond a reasonable doubt under Chapman v. California, 386 U.S. 18 (1967). (Appendix A, p 13)

II. At trial, petitioner objected to the introduction of evidence obtained during the search of his apartment. (R pp 59-61, 67, 83, 88, 102, 103, 185, 192) On appeal, petitioner argued that his consent was not voluntary under Schneckloth v. Bustamonte, 412 U.S. 218 (1973), and that even if it were, it had been superseded and negated under Bumper v. North Carolina, 391 U.S. 543 (1968), by the police announcement of a warrant before the search began. (Appellant's Brief, pp 19-24) The North Carolina Supreme Court held

that despite the trial court's refusal to hear all of the evidence concerning the consent, its conclusion that the consent was voluntary was supported by the findings (Appendix A, p 22) and that the search warrant did not negate a prior consent; "[a]t trial, the State had every right to rely on either [the consent or the warrant]" (Appendix A, p 23) despite the exclusion of all evidence concerning the warrant.[3]

III. Petitioner excepted to the trial judge's instruction to the jury that it must recommend the death penalty if it found beyond a reasonable doubt that aggravating circumstances outweighed mitigating circumstances. (R pp 222, 230, 233) On appeal, petitioner challenged such a construction of North Carolina's statute as being in conflict with this Court's decisions regarding imposition of the death penalty. (Appellant's Brief, pp 57-58) The North Carolina Supreme Court, stating that the argument was asserted and rejected in State v. Pinch, ____ N.C. _____, 292 S.E.2d 203, (1982) and State v.Williams, 304 N.C. 394, 284 S.E.2d. 437 (1981), relied on its opinions in those two cases as the basis for dismissing petitioner's claim. (Appendix A, p 41) Justice Exum dissented, referring to his dissent in Pinch. (Appendix A, p 44) (The relevant portion of the Pinch opinion is attached as Appendix C; the Pinch dissent is attached as Appendix D.)

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER THERE ARE LIMITS TO A COURT'S ABILITY, BY MERELY DEEMING THE ERROR HARMLESS IN THE FACE OF COMPELLING INDICATIONS TO THE CONTRARY, TO PERMIT A DEFENDANT'S EXECUTION DESPITE AN ADMITTEDLY UNCONSTITUTIONAL DENIAL OF ACCESS TO A STOREHOUSE OF FACTS FOR COUNTERACTING THE STATE'S PURELY CIRCUMSTANTIAL CASE.

The bodies of the victims whom the petitioner was accused of murdering were discovered on August 26, 1980. From then until after petitioner's trial was concluded in late December, the apartment was cordoned off and remained under the control of the Pinehurst Police Department. (R pp 58, 236) The defense sought in its initial request for voluntary discovery on October 13,

3. At trial, the state justified the search on the basis of consent and objected, successfully, to defense questions regarding the warrant. (R pp 188, 190, 191, 198-202) The warrant was excluded from the record on appeal. (R p 246)

1980 (R p 26), in its subsequent motion for discovery on October 29, 1980 (R p 30), during the trial (R pp 195-198), and again immediately after judgment was entered (R p 236), to view those premises. The court each time denied the motion. (R pp 41, 198, 236)

This denial occurred despite the absence of any expression by the state of reasons for not permitting it, despite the court's knowledge of the prosecutor's policy that denied petitioner's counsel access to investigating officers [4] (R pp 51, 52), despite the court's having reason to believe petitioner himself was particularly handicapped in his ability to recall the events of the critical four-hour period during which the defendant's whereabouts were not established (R pp 48, 49), despite the court's knowledge that the minimal forecast of the state's evidence at a probable cause hearing had been bypassed through the court's ex parte order (R p 38), despite the court's refusal to allow the defendant, even for the record, to elicit at the motion hearing information from state experts about the types of investigation that had been done by the state and about the reconstruction of the crime scene (R pp 47, 48), despite the court's knowin,, after the trial started, that the state had failed to disclose exculpatory information, [5] and despite the court's refusal to permit disclosure of the identity of a witness whose testimony would demonstrate at least a reduced opportunity for the defendant to have

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4. The district attorney stated to the court:

> ...I told my assistants to inform the agents not to provide information to defense counsel, and I will continue to do that...in all criminal cases because the only purpose we submit in...having the officer explain fully how he treated each and everything down there that might be used as evidence against defendant is solely for the purpose of trying to find some flaw in it so he can cross-examine and discredit my officer at the trial stage--and that's the reason for that instruction....--and certainly I instructed the officer that and will again. (R p 52)

5. As early as August 27, only a day after the bodies were found, investigating officers for the state received creditable information (R p 171) suggesting that on Monday night, August 25, at a time when the killings could have occurred but when petitioner was in the hospital, shouts came from the direction of victims' apartment, a light was on in the victims' apartment and moments later was off (R p 116), and, furthermore, that a man was seen jumping either from the balcony of the victims' apartment or from the adjacent balcony of another apartment. (R p 118) Apparently with attention already focused on petitioner and thus without interest in exploring avenues inconsistent with that focus, the officers did not follow up on that information. (R pp 117, 199) Even when the witness who saw the man jump went to the police station days later to tell the officer that he had again seen the man and knew where he worked, there was no follow-up. (R p 119) Defense counsel independently found, only a week before trial, that such witnesses existed. (R p 159)

committed the crime.[6]

Petitioner successfully asserted in the courts below and continues to assert that this denial of access to the crime scene violated his right to due process and to the effective assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution.

The due process claim is based, among other things, on the observations that due process requires the balance in a criminal trial to allow "both the defendant and the state ample opportunity to investigate certain facts crucial to the determination of guilt or innocence." Wardius v. Oregon, 412 U.S. 470, 474 (1973) (cites omitted), and that "it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant fact." Dennis v. United States, 384 U.S. 855, 873 (1966).

The claim of the denial of the effective assistance of counsel is based, among other things, upon the holdings that the Sixth Amendment assures "effective aid in the preparation and trial of the case," Powell v. Alabama, 287 U.S. 45, 71 (1932), that implicit in the right to counsel is the right to adequate preparation before trial when "consultation, thoroughgoing investigation and preparation [are] vitally important" Id. at 57, and that the Sixth Amendment may be violated whenever defense counsel is required to operate under circumstances that render the assistance of counsel ineffective. See Ferguson v. Georgia, 365 U.S. 570 (1961); Brooks v. Tennessee, 406 U.S. 605 (1972); Geders v. United States, 425 U.S. 80 (1976).

The North Carolina Supreme Court, although not addressing itself to the issue of effective assistance of counsel, readily agreed that petitioner's "contention that denial of his motions to view the crime scene amounted to a denial of due process of law is persuasive" (Appendix A, p 12) and that "rudimentary fairness would have allowed defendant to inspect these premises under these circumstances". (Appendix A, p 13)

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6. The latest that witnesses who testified in the trial saw Diane Chalfinch alive was at 12:30 or 1:00 a.m. on Monday, August 25, but during the cross-examination of an officer involved in the investigation, it became apparent that he knew of one or more persons who had seen the victims alive after that time. When petitioner asked the officer whether or not he knew of persons who had seen the decedent after 1:00 a.m. on August 25, the trial judge sustained an objection apparently based on hearsay. (R p 68) The witness was allowed to answer for the record that yes, he did have such knowledge (R p 69), but when defense counsel, out of the presence of the jury, asked the witness to identify those individuals (R p 69), the state again objected, and the court would not permit any answers indicating who the persons were (R p 69) or when the decedents had been seen. (R pp 70, 71)

The court quickly went on, however, to declare: "[o]ur reading of the record here leaves no doubt that the trial court's error was harmless. This is so because evidence of this defendant's guilt was overwhelming." (Appendix A, p 13)

The court erred in applying a harmless error doctrine to permit the execution of petitioner under the circumstances of this case, for many reasons: the harmless error doctrine should not be applicable when the very constitutional error it is brushing aside is one that might well, if observed, have rendered the state's evidence less "overwhelming"; the evidence in question and the court's findings about it do not rise to the level necessary for constitutional harmless error; and the error in question, in addition to being a denial of due process, was also the kind of denial of effective assistance of counsel that cannot be declared to be harmless upon the mere assertion of overwhelming evidence of guilt.

The court cited as its overwhelming evidence that a ring previously worn by the petitioner was found in the body of one of the victims; that a "bloody palm print" lifted from the bedroom wall of the apartment was that of the petitioner; that a bloody knife blade, similar to knives owned by the petitioner, was found at the crime scene, and that blood was found at the entrance to and in petitioner's apartment.[7] (Appendix A, pp 13,14)

Even if this evidence when standing uncontradicted were overwhelming (which, as is pointed out in the following paragraph, is not the case), it is plausible to conclude that it would not have stood uncontradicted had petitioner's rights not been violated by preventing him from inspecting the scene of the crime. Lack of access to the scene of the crime, for example, precluded petitioner from determining whether the jewelry scattered about the floor of the apartment (the existence of which was an inadvertent discovery during cross-examination of one of the state's witnesses) (R p 66) may have afforded some explanation for the presence of the ring; examination of the

7. The court also cited a "confession" by the defendant to a cellmate. In fact, no confession was ever presented in the state's evidence of guilt. The court apparently referred to an ambiguous admission arguably made by petitioner not to a cellmate but to an inmate of a nearby drunk tank, and introduced by the state only during the sentencing phase of the trial. The alleged admission itself was questionable not only because of its source but also because of its content, which might well have been only a recitation by the defendant of what he was charged with. Petitioner was unable to cross-examine the witness adequately because he was denied access to the witness' criminal record and prior statements to state officials. (R pp 206, 207)

apartment could have permitted the defendant to confirm the inference that the palm print of the defendant was no more suspiciously placed than many other non-victim prints in the apartment and an examination of the apartment may have permitted the defense to establish that the brand of the bloody knife was a brand not only used by the defendant and many others who worked at Pinehurst Hotel (R p 110) but also used by the victim herself (a possibility which the investigating officers seemed never to have considered, since the contents of the victim's kitchen drawers were not examined). (R pp 63, 66) To deny access to the scene and then to use evidence from the scene to indicate overwhelming guilt is as if a court denied a defendant the right to cross-examine a key state's witness, and then found that error to be harmless because the witness' testimony was persuasive and uncontradicted. Access to the crime scene was important for petitioner not only to defuse the evidence from the state based upon that crime scene but also to undergird the defense contention that the crime had occurred at a time when petitioner was clearly hospitalized and unable to commit it. [8] A single discovery by the defense of a single newspaper dated later than August 24, a single prescription bottle or sales slip bearing such a date, or anything purchased that could be traced to a date later than the 24th would have immediately rendered all of the state's evidence far less than overwhelming.

Mere assertion that evidence is overwhelming and that the constitutional violation is thus harmless does not make it so. Anderson v. Nelson, 390 U.S. 523 (1968); Burgett v. Texas, 389 U.S. 109 (1967). Of the "overwhelming" evidence cited by the North Carolina Court, only the apparent presence of petitioner's ring in the body of one of the victims is compelling, but even that is not conclusive. No evidence places the ring with the defendant less than six hours before the defendant could have committed the crime, and even that evidence (from a child with a very limited opportunity to observe) (R p 93) is not unassailable. [9] In addition, the state's evidence was clear that

8. In addition to the defense evidence indicating noises from the direction of the victim's apartment, and the presence of a supicious person near that apartment at about that time, the medical examiner testifying for the state indicated that the condition of the bodies was consistent with their having been killed at the time this later suspicious person was present, but did not indicate that it was consistent with their death much earlier, the only time that the defendant could have committed the crime. (R p 75)

9. Despite a timely request and no apparent reason for the state's objection, defense counsel was not allowed at trial to inspect the witness' prior statement to test her recollection and credibility. (R p 94)

petitioner frequently removed the ring (R pp 90, 91) and that, on the night before the time he is alleged to have committed the killings, he had left other articles of personal belongings behind. (R p 92) The remaining evidence cited by the court was, at best, suggestive of petitioner's guilt. His palm print was, at most, associated with blood found in the apartment (R pp 85, 87) as were, undoubtedly, at least some of the identifiable but unidentified other prints found there (R p 80); the knife blade was a common brand, owned not only by petitioner but also by most of the many other kitchen employees of Pinehurst (R p 110); and the blood in petitioner's apartment was in minute quantities (R pp 85, 86) and in any event no more than might be expected from the acknowledged wound on petitioner.

Also suggesting that the evidence was less than overwhelming are these facts: Despite extensive tests, no blood, hair, or other physical evidence of petitioner's was found in the victim's apartment (R p 86); despite extensive tests, no characteristics of the victim's blood were found in petitioner's apartment (R p 86); and despite extensive tests, no indications of any attempt by petitioner to clean up his apartment were ever found.

In addition, as has been pointed out above, the denial of access to the crime scene is in violation not only of due process but also of the right to effective assistance of counsel, and this constitutional violation should never be found to be harmless beyond a reasonable doubt. See Gideon v. Wainwright, 372 U.S. 335 (1963); Holloway v. Arkansas, 435 U.S. 475 (1978). Whether the error is in due process or effective assistance of counsel, the court's conclusions about the basis of harmlessness fall short of the standard requiring the state to demonstrate harmfulness beyond a reasonable doubt and requiring emphasis by a reviewing court on the impact of the error on the "substantial rights" of the defendant. See Chapman v. California, 386 U.S. 18 (1967).

The harmless error rule as used by the North Carolina Court has not been applied in any case, let alone a capital case, to override clear constitutional error in which it was plausible that affording the right would have lead to additional evidence, in which the state deliberately denied efforts to determine the harmfulness of the error, in which the right involved went to the reliability of the fact-finding process itself and in which the error was not merely in admitting evidence that was cumulative in effect. Cf.

Chapman v. California, 386 U.S. 18 (1967), Bumper v. North Carolina, 391 U.S. 543 (1968); Foster v. California, 396 U.S. 440 (1969); Milton v. Wainwright, 407 U.S. 371 (1972); Moore v. Illinois, 434 U.S. 220 (1977).

Certiorari should be granted on this issue as a means of limiting the application of the harmless error rule where capital punishment of defendants is involved and where clearly important constitutional rights which go to the integrity of the truth-finding mechanism of the criminal process are denied.

II. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE THE QUESTION OF WHETHER OR NOT A CONSENT TO SEARCH CAN LATER BE WITHDRAWN BECAUSE THE NORTH CAROLINA SUPREME COURT HAS RENDERED A DECISION IN APPARENT CONFLICT WITH BUMPER V. NORTH CAROLINA, 391 U.S. 543 (1968), IN THAT IT UPHELD A QUESTIONABLE CONSENT AS JUSTIFICATION FOR A SEARCH DESPITE THE ISSUANCE AND ANNOUNCEMENT OF A SEARCH WARRANT AND DESPITE THE ARREST OF THE CONSENTER SOON AFTER THE SEARCH BEGAN.

Numerous items seized from petitioner's apartment during a search and examination that extended over many hours were admitted into evidence over petitioner's objection. (R pp 59-61, 67, 83, 88, 102, 103, 185, 192) The prosecutor, ignoring a search warrant that had been prepared and presented to petitioner at the time of the search, sought to rely upon a form giving permission to search petitioner's apartment. (R p 189) The form was signed by petitioner at 5:21 p.m. on August 28, 1980 (R p 72), after several hours of interrogation in the office of the chief of security for his employer, the Pinehurst Hotel. (R pp 183-185) Hours later, law enforcement officials arrived at petitioner's apartment, waited for the search warrant to be brought, then announced they had a warrant (R pp 198, 199) and began a search lasting from 8:00 p.m. until at least 3:00 a.m. on the 29th. (R pp 81, 198) Between 9:00 and 9:30 p.m., petitioner was arrested and taken away. (R p 199)

Petitioner's attempts at trial to prove the consent was involuntary [10] and to establish the existence of a warrant were completely rebuffed by the court. (R pp 188-191, 199-202) He was not allowed to show for the record that the warrant had been signed by testifying officers (R pp 200-202); the court refused to hear any evidence concerning a warrant(R pp 189, 191, 199-201)

10. Petitioner's request to offer evidence - evidence that he was unlawfully seized - was denied. (R pp 185, 187)

and excluded it from the record on appeal. (R p 246)

Even assuming petitioner's earlier consent was voluntary, it cannot support a search later conducted in reliance upon a warrant if there is any right to withdraw a consent once it is given. The important issue of whether or not a consent to search can be withdrawn has not been addressed by this Court, however there is support for the proposition that such a right exists, 2 LaFAVE, SEARCH AND SEIZURE §8.1 at 632-635 (1978), and courts have so held. Id. (citing applicable cases); see also A.L.I. MODEL CODE OF PREARRAIGNMENT PROCEDURE § 240.3(3)(iii)(1975).

Clearly, if petitioner could withdraw his consent, then the validity of the search could not be premised upon the earlier consent for the announcement of the warrant would have terminated any right to withhold or withdraw consent, and the principle of Bumper v. North Carolina, 391 U.S. 543 (1968) would apply:

> A search conducted in reliance upon a warrant cannot be later justified on the basis of consent if it turns out that the warrant was invalid. The result can be no different when it turns out that the State does not even attempt to rely upon the validity of the warrant, or fails to show that there was, in fact, any warrant at all.

Id. at 549, 550. In Bumper, a consent given after the announcement of a warrant was held to be involuntary because it was "instinct with coercion." Likewise, consent given before a warrant is read, even if free of coercion at the time, cannot survive the warrant as a voluntary permission because the right to resist a search, and, therefore, the right to withhold or withdraw consent, is terminated by the warrant. If the giving of consent does not include the right to withdraw it, the state may, as was done in petitioner's case, actually conduct a search under apparent lawful authority but then, if the warrant is faulty, ignore it, justify the search on the basis of a state consent and preclude any challenge to the announced "lawful authority."

The Court should grant certiorari because the right to withdraw consent is an important issue that has not previously been decided and its resolution is needed to determine how long and under what circumstances a consent can remain valid.

III. THE COURT SHOULD GRANT CERTIORARI BECAUSE THE NORTH CAROLINA SUPREME COURT, BY MISINTERPRETING DECISIONS OF THIS COURT, IS REQUIRING THE IMPOSITION OF THE DEATH PENALTY IN ALL CAPITAL CASES WHERE AGGRAVATING CIRCUMSTANCES ARE FOUND TO OUTWEIGH MITIGATING CIRCUMSTANCES.

This same issue is before this Court in several pending Petitions for Writ of Certiorari to the North Carolina Supreme Court. See Pinch v. North Carolina, No. 82- , filed August 31, 1982; Williams v. North Carolina, No. 82-____; and Smith v. North Carolina, No. 82-_____. In petitioner's case, the North Carolina Supreme Court referred to its decision in the Pinch case without additional commentary. (Appendix A, pp 40, 41) (The relevant portion of the Pinch opinion is attached as Appendix C.) The dissent in petitioner's case, filed by Justice Exum, also referred, without additional comment, to the dissent in Pinch. (Appendix A, p 44) (The Pinch dissent is attached as Appendix D.)

In order not to unduly burden this Court, petitioner is submitting only a brief summary of his argument as Justice Exum and counsel for Pinch have ably presented the issue. (The relevant portion of the Pinch petition is attached as Appendix E.)

The North Carolina death penalty statute does not, by its language, require imposition of the death penalty when aggravating circumstances are found to outweigh those in mitigation, but the North Carolina Court has so interpreted the statute in order to prevent the exercise of "unbridled discretion". 292 S.E.2d at 228 (Appendix C, p 1) The statute requires that a jury render a recommendation based upon (1) whether any of the enumerated aggravating circumstances exist, (2) whether any enumerated mitigating circumstances outweigh the aggravating circumstances found to exist and (3) whether the defendant should be sentenced to life imprisonment or to death. N.C. GEN. STAT. §15A-2000(b) When the death penalty is recommended, the jury is required to sign a writing that states (1) at least one enumerated aggravating circumstance exists beyond a reasonable doubt, (2) such aggravating factor or factors are sufficiently substantial to warrant the death penalty and (3) mitigating circumstances do not outweigh the aggravating ones. N.C. GEN. STAT. §15A-2000(c).

The North Carolina Supreme Court has, based upon its interpretation of this Court's decisions, determined that a jury must recommend the death penalty whenever aggravating circumstances are found to outweigh mitigating circumstances. (Appendix A, p 41; Appendix C, p 2) Thus, a trial court must instruct, as it did in petitioner's case following Issue Four (whether aggravating factors outweigh mitigating factors), "If you answer issue four

"no", indicate life imprisonment...if you answer issue four "yes", indicate death." (R pp 230, 233, 222)

The effect is the same as that struck down in Woodson v. North Carolina 428 U.S. 280 (1976): The court has removed "all sentencing discretion [so that] there could be no successful Furman based attack on the North Carolina statute." Id. at 300 (1976) (quoting the state's brief) (emphasis deleted) (brackets in original deleted). Although North Carolina's new statute allows for consideration of mitigating factors and allows the jury to make the ultimate choice, the court has precluded the exercise of that final sentencing discretion by requiring the jury to recommend death once the mitigating factors are found to be less substantial than the aggravating ones. The process thereby reduces the significance of mitigating factors by excluding the consideration of them "in fixing the ultimate punishment of death." Id. at 304.

A sentencing process involving the penalty of death, "qualitatively different from a sentence of imprisonment", id. at 305, must allow for compassion and mercy. The stringent guidelines needed to prevent the arbitrary imposition of death are not meant to preclude the exercise of compassion. The North Carolina Supreme Court has transformed the shield, designed to protect defendants from impassioned and unreasonable death sentences, into a sword that must be wielded even though the jury may find reason to be merciful. [11]

In petitioner's case, the mandatory instruction is particularly suspect. The jury, after it had deliberated for some time following the sentencing hearing, submitted to the court the question, "under life imprisonment, what, if any, are the chances for parole? If so, how many years?" (R p 224) Depite petitioner's request for "life sentence means life sentence, and death means death" (correct North Carolina law) (R p 225), the court instructed: "you should determine the question as though life imprisonment means exactly what it says." (R p 226) (emphasis added) [Petitioner's second request for a more complete instruction to clarify any misunderstanding was denied. (R p 227)]

11. It appears that a judge may exercise merciful discretion even though a jury may not for the statute designates "Sentence Recommendation by the Jury" and sentence imposition by the judge, N.C. GEN. STAT. §15A-2000(b) and prohibits the judge from imposing death unless the jury unanimously recommends it, id., but does not require death to be imposed when unanimously recommended.

The court's use of the phrase "as though", gave credence to the common misconceptions regarding the granting of parole and executive clemency. Obviously, the jury was considering a life sentence or it would not have asked the question, but the mandatory instruction, coupled with the probable fear that parole might be imminent, precluded a verdict less than death.

The Court should grant certiorari to determine whether the Constitution permits a state to restrict the sentencer's final exercise of discretion or whether the Constitution prohibits such a limitation in a death penalty case.

CONCLUSION

For the foregoing reasons, the Writ of Certiorari should be granted.

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Respectfully submitted,

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